No. 80-698

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEWSPAPER PRINTING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by insisting to impasse on unilateral control over the scope of the bargaining unit—a proposal that would have resulted in modification of the existing unit—and by thereafter making unilateral changes in terms and conditions of employment.

2. Whether the Board abused its discretion, under Section 10(c) of the Act, by ordering petitioner to restore the terms and conditions of employment that it had unilaterally changed and to bargain in good faith with the Union as the representative of its employees in the existing bargaining unit, as defined in the parties' most recent collective bargaining agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bradford-Robinson Printing Co., 193 N.L.R.B. 928 11

Columbia Tribune Publishing Co., 201 N.L.R.B. 538, enforced in relevant part, 495 F. 2d 1384 ..... 10, 11

Douds v. *ILA*, 241 F. 2d 278 ..... 9, 10

Graphic Arts International Union v. *NLRB*, 505 F. 2d 335 11

H. K. Porter Co. v. *NLRB*, 397 U.S. 99 12

Hess Oil & Chemical Corp. v. *NLRB*, 415 F. 2d 440, cert. denied, 397 U.S. 916 9

Jelco, Inc., 209 N.L.R.B. 827 11

Marion Power Shovel Co., 230 N.L.R.B. 576 ... 11

McQuay-Norris Mfg. Co. v. *NLRB*, 116 F. 2d 748, cert. denied, 313 U.S. 565 9-10

Metromedia, Inc. KMBC-TV v. *NLRB*, 586 F. 2d 1182 11

NLRB v. *Southland Cork Co.*, 342 F. 2d 702 9

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Page

Cases—Continued:

NLRB v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 9

Newport News Shipping & Dry Dock Co. v. *NLRB*, 602 F. 2d 73 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 6, 7, 10

Section 8(a)(5), 29 U.S.C. 158(a)(5) 6, 7, 8, 10

Section 8(d), 29 U.S.C. 158(d) 1

Section 9(b), 29 U.S.C. 159(b) 1, 10, 11

Section 10(c), 29 U.S.C. 160(c) 1, 2, 12

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 625 F. 2d 956. The decision and order of the National Labor Relations Board (Pet. App. 23a-98a) are reported at 232 N.L.R.B. 291.

JURISDICTION

The judgment of the court of appeals (Pet. App. 99a-100a) was entered on September 9, 1980. A petition for rehearing was denied on the same date (Pet. App. 101a-102a). The petition for a writ of certiorari was filed on October 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3. Also relevant are Sections 8(d), 9(b), and 10(c) of the Act, 29 U.S.C. 158(d), 159(b), and 160(c).

Section 8(d) provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 9(b) provides in pertinent part:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

Section 10(c) provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *.

STATEMENT

1. Petitioner is an Oklahoma corporation, engaged in the printing, sale, and distribution of daily newspapers in Tulsa, Oklahoma, where its principal place of business is located (Pet. App. 2a, 32a-33a). For many years, petitioner's composing room employees have been represented by the Union[1] (Pet. App. 2a, 34a). The last collective bargaining agreement between the parties, which ran from February 1, 1973, to January 31, 1976, described the employee unit represented by the Union in the following terms (Pet. App. 34a n.1, 2a-3a n.1):

> Sec. 3. Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as hand compositors, typesetting machine operators, makeup men, bank men, proofpress operators, proofreaders, machinists for typesetting machines, operators and machinists on all devices which cast or compose type of slugs, or film, operators of tape perforating

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[1]Tulsa Typographical Union, Local No. 403, International Typographical Union, AFL-CIO.

> machines and recutter units for use in composing or producing type, operators of all phototypesetting machines (such as Fotosetter, Photon, Linofilm, Monophoto, Coxhead Liner, Filmotype, Typro and Hadego) and employees engaged in proofing, waxing and paste makeup with reproduction proofs, processing the product of phototypesetting machines, including development and waxing; paste makeup of all type, hand lettered, illustrative, border and decorative material constituting a part of the copy; ruling, photoproofing, correction, alteration and imposition of the paste makeup serving as the completed copy for the camera used in the plate making process. * * *.

In practice, the "composing room work" described above was actually performed in five separate rooms on the third floor of petitioner's building (Pet. App. 38a-39a n.5, 2a n.1). The jobs listed in the contract union description were "generally" in existence and were being performed by the composing room employees throughout the collective bargaining negotiations described below (Pet. App. 71a n.22).

On September 16, 1975, Robert L. Melton, president of the Union, wrote Kenneth Fleming, petitioner's vice president and general manager, requesting that bargaining begin immediately for a new collective bargaining agreement to replace the current agreement, which was to expire January 31, 1976 (Pet. App. 35a, 3a). Fleming replied that any agreement, conditions of employment, or other understanding then in effect would terminate on the contract expiration date, and he offered to bargain for a new agreement (Pet. App. 35a-36a, 3a).

At the first negotiating meeting between the parties on November 11, 1975, the Union presented its contract proposal (Pet. App. 36a-37a, 3a). Discussion at the meeting and at a second meeting on December 17, 1975, centered on major technological changes that petitioner announced it planned to make, which would have resulted in the extensive elimination of unit jobs and a reduction in the number of unit employees (Pet. App. 37a-39a, 44a-45a, 3a). These changes included replacement of the traditional "hot type" process in the composing room with a new computerized "cold type" process (Pet. App. 38a-39a & nn. 5 & 6 3a-4a & n.3). Petitioner emphasized that it wanted complete flexibility in making job assignments and in placing the new equipment and determining who would operate it (Pet. App. 38a). The Union expressed concern about the effect of the new technology on the bargaining unit, the extent of possible job displacement, and the right of unit employees to operate the new equipment (Pet. App. 44a, 46a-47a).

Discussion of these matters continued at the third negotiating meeting on January 14, 1976 (Pet. App. 47a-50a, 5a). At the conclusion of the third meeting, petitioner presented its first written contract proposal (Pet. App. 50a, 81a). Petitioner's proposal eliminated the existing unit description in the current collective bargaining agreement and instead provided (Pet. App. 5a, 24a, 50a, 93a):

> The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room. It is the express intention of the Employer to accomplish his complete production needs in the manner which he determines to be the most effective and economic method to fulfill the work requirements.

Petitioner's negotiator Fleming suggested that, as this proposed clause was "quite different from the historic contract language," the Union would probably want to study the language thoroughly before making a response to it (Pet. App. 51a, 5a). Union negotiator Jobe agreed that this would be advisable and the meeting ended with the parties' arranging to meet again on January 21, 1976 (Pet. App. 51a, 52a).

At the fourth meeting, on January 21, Union negotiator Jobe stated that the Union had studied petitioner's proposed unit/jurisdiction clause and "there's no way in the hell the Union could ever accept it, that to do so would be to kill the Union" (Pet. App. 54a, 5a-6a). He agreed with Fleming that an impasse had been reached on the issue (Pet. App. 55a, 6a). Negotiating meetings on January 28 and 29 produced no progress on the unit/jurisdiction issue (Pet. App. 56a-61a, 81a-82a, 6a-7a). On February 2, 1976, petitioner wrote the Union (Pet. App. 7a-8a, 61a-62a, 96a-98a):

> In light of the fact that the contract with your Union expired by its terms and notification on January 31, 1976, and pending execution of a new agreement * * * [and] a continuation of the existing impasse, no provisions, past practices or obligations that existed under the prior contract will be effective.
>
> We announce the following work relationships that will exist not as a contractual understanding but work practices as follows* * * .

The letter then stated that there would be no change in wages or hours but announced a number of unilateral changes with respect to working conditions, including the right of management to accomplish production needs in the manner it "determine[d] to be the most effective and economical"; "to cease any procedure or remove any equipment from the composing room, in the interest of efficiency"; and, in the event of work duplication between departments or employees, to "determine who will do the work" (Pet. App. 7a-8a & n.8, 96a).

In negotiating meetings held during the next seven months, virtually all contract items were discussed, but the parties concentrated their efforts on the unit/jurisdiction language, which remained the primary obstruction to the reaching of a new agreement (Pet. App. 8a, 65a-66a). The Union took the position that petitioner was demanding the right to determine unilaterally what work should remain in the Union's jurisdiction and who should be in the unit and was "making it impossible for the Union to know for whom it was bargaining" (Pet. App. 9a, 64a). Petitioner asserted that its unit/jurisdiction proposal was designed to provide the necessary flexibility to print its newspapers most efficiently and that, particularly for the purpose of accommodating the changes dictated by the new technology, petitioner wanted no limitation upon its right to remove any work from the jurisdiction of the Union, and desired the further unequivocal right to place new equipment and processes in the composing room (Pet. App. 9a, 64a). On June 11, 1976, a federal mediator, who had been assisting the parties, declared that the negotiations were hopelessly deadlocked, citing the unit/jurisdiction issue as the major area of disagreement (Pet. App. 9a, 66a & n.14). Negotiations ceased on August 26 (Pet. App. 9a, 66a).

2. A complaint issued on charges filed by the Union alleging that petitioner's conduct violated its obligation under Section 8(a)(5) and (1) of the Act to bargain in good faith with the Union (Pet. App. 31a-32a). Following an administrative hearing, the Board found, in agreement with its administrative law judge, that the parties had reached a bargaining impasse on January 21, 1976, and that the principal cause of that impasse was their disagreement over the contract unit/jurisdiction language (Pet. App. 24a, 81a). Unlike the administrative law judge, however, the Board concluded that petitioner's insistence on its proposed unit/jurisdiction clause violated Section 8(a)(5) and (1) of the Act because the clause would have given petitioner unilateral control over the scope of the unit and would have modified the existing unit (Pet. App. 24a-26a). Accordingly, the Board found that petitioner's subsequent unilateral changes in employees' terms and conditions of employment

also violated Section 8(a)(5) and (1), since petitioner's insistence on its unit/jurisdiction clause precluded a genuine impasse on the other issues (Pet. App. 26a-27a).

The Board's order directs petitioner to cease and desist from the unfair labor practices found and any like or related violations to restore the employment conditions that it had unilaterally changed and make employees whole for any losses suffered as a result of the unilateral changes, to bargain in good faith with the Union as the representative of its employees in the appropriate unit as defined in the most recent collective bargaining agreement, and to post appropriate notices (Pet. App. 27a-29a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 12a-22a). Specifically, the court approved the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act by insisting to impasse on a nonmandatory subject of bargaining—*i.e.*, a contract clause that would have altered the scope of the existing bargaining unit and would have given petitioner unilateral control over the unit's scope (Pet. App. 12a-15a). Such a clause, the court held, would usurp the Board's broad authority to determine the appropriate unit under Section 9 of the Act (Pet. App. 12a), and would defeat the employees' right to bargain collectively through representatives of their own choosing by denying recognition to their designated bargaining agent in an established bargaining unit (Pet. App. 14a-15a).[2]

The court recognized that the transfer or automation of unit work is a mandatory subject of bargaining, but noted that petitioner "was not content with the right to bargain hard to a genuine impasse and thereafter to implement its proposed technological changes" (Pet. App. 16a). Rather,

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[2]The court rejected petitioner's contention that the Union was attempting to expand the unit description and held that, in any event, such conduct would not have provided a defense to the charge against petitioner (Pet. App. 17a-18a).

petitioner demanded contractual authorization "to alter the composition of the unit at will by unilaterally electing to transfer work out of the unit" (*Ibid.*). The court concluded that to give an employer such unilateral control "would effectively deprive unit employees of their statutory right to collective representation and bargaining as to the reduction or elimination of their jobs through work transfers or automation" since "the employer's unilateral action would place those jobs beyond the scope of the unit represented by the Union" (*Ibid.*).

Finally, the court approved the Board's order directing petitioner to restore all employment conditions that it had unilaterally changed and to bargain in good faith with the Union as the exclusive representative of its employees in the appropriate unit as defined in the parties' most recent collective bargaining agreement (Pet. App . 18a, 22a). The court rejected petitioner's contention that the Board's order "forces the parties to agree to a substantive contract term dealing with the placement of work in violation of the principles announced in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 [1970]" (Pet. App. 18a). On the contrary, the court observed: "Nowhere in its order does the Board attempt to compel agreement on work placement or any other subject" (Pet. App. 19a). Moreover, "[n]othing in the Board's order purports to impede [petitioner's] planned conversion from 'hot' to 'cold' type" (Pet. App. 22a). "Rather, the order merely directs that in implementing the technological changes [petitioner] accord the union its rightful recognition as the representative of all employees in the appropriate unit." (*Ibid.*). The court, therefore, concluded that "the Board properly exercised its remedial discretion under § 10(c)" (*Ibid.*).[3]

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[3]In addition, the court approved the provisions of the Board's order directing a "rollback" of the conditions of employment petitioner unilaterally changed since there was no genuine impasse at the time the changes were implemented and each change constituted an independent violation of Section 8(a)(5) of the Act (Pet. App. 19a-22a). The court further concluded that the record did not support petitioner's contention that the remedial relief ordered by the Board here would be "economically prohibitive or punitive" (Pet. App. 22a).

ARGUMENT

1. An employer violates its statutory obligation to bargain in good faith by insisting, as a condition of agreement, that the union acquiesce concerning an issue outside the mandatory subjects of bargaining—"wages, hours, and other terms and conditions of employment" (Section 8(d) of the Act). *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958). It has long been settled that recognition of a collective bargaining representative as required by the Act and the scope of the bargaining unit, whether established by Board certification or by voluntary recognition, are not mandatory subjects of bargaining.[4] There can "be no genuine bargaining as contemplated by the Statute until complete recognition ha[s] been granted as the Act requires" (*McQuay-Norris Mfg. Co.* v. *NLRB*, 116

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[4]See *NLRB* v. *Wooster Division of Borg-Warner Corp., supra*, 356 U.S. at 343-344 (employer unlawfully insisted on recognition clause that substituted uncertified local union for certified international); *McQuay-Norris Mfg. Co.* v. *NLRB*, 116 F. 2d 748, 750-752 (7th Cir. 1940), cert. denied, 313 U.S. 565 (1941) (employer unlawfully insisted on clause recognizing union as representative only of union members in unit); *Douds* v. *ILA*, 241 F. 2d 278, 281 (2d Cir. 1957) (union charged with unlawful insistence on expanding geographical scope of unit); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 602 F. 2d 73, 76-77 (4th Cir. 1979) (employer unlawfully insisted on altering unit description by replacing the words "designers" and "design" with the words "draftsmen" and "drafting," on asserted ground that change "was designed to reflect more accurately the type of work done by the employees in the unit"); *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F. 2d 440, 443-445 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970) (employer unlawfully insisted on excluding laboratory and warehouse employees from existing contract unit); *NLRB* v. *Southland Cork Co.*, 342 F. 2d 702, 706 (4th Cir. 1965) (employer unlawfully insisted on restricting union recognition clause to "permanent" employees).

F. 2d 748, 751 (7th Cir. 1940), cert. denied, 313 U.S. 565 (1941)), and "[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." *Douds* v. *ILA*, 241 F. 2d 278, 282 (2d Cir. 1957). Moreover, by virtue of Section 9(b) of the Act, the Board has ultimate authority to determine the appropriateness of a unit for collective bargaining purposes (*id.* at 282-283). Applying these settled principles, the court below properly concluded that petitioner violated Section 8(a)(5) and (1) of the Act by insisting on altering the existing contractual unit description so as to redefine "the appropriate unit" to include "only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room" (see page 4, *supra*).[5]

2. Contrary to petitioner's contention (Pet. 19-26), it was not necessary to insist on altering the contract unit description in order to prevent automation from producing an expanded unit that would cover the editorial and advertising department employees, who allegedly have no community of interest with the composing room employees. At the time of the collective bargaining negotiations relevant here, unit employees in the composing rooms were performing essentially those functions described in the contract unit description (see page 3, *supra*). Without altering that description, petitioner was free to bargain in good faith with the Union about the changes to automated production it proposed to make and to institute those changes if the bargaining reached a *bona fide* impasse. Thereafter, if the effect of the automation, in petitioner's view, was to eliminate

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[5]Cf. *Columbia Tribune Publishing Co.*, 201 N.L.R.B. 538, 550-551 (1973), enforced in relevant part, 495 F. 2d 1384, 1388-1391 (8th Cir. 1974) (employer violated Act by refusing to agree on any contractual unit description because it wanted to retain flexibility to assign cold type work to employees outside the unit).

certain of the unit job functions, or to alter those functions so as to remove them from the scope of the unit, petitioner could have invoked appropriate Board procedures for clarifying the unit to exclude any job functions no longer within it. Alternatively, it could have invoked Board procedures to resolve any questions of representation presented with respect to the editorial and advertising department employees.[6] See *Bradford-Robinson Printing Co.*, 193 N.L.R.B. 928 (1971); *Jelco, Inc.*, 209 N.L.R.B. 827 (1974); *Marion Power Shovel Co.*, 230 N.L.R.B. 576 (1977).

Instead, petitioner sought to disregard the Board's authority under Section 9(b) of the Act to determine the appropriate unit, and to assign to itself the function of determining

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[6]Had petitioner sought to invoke these Board procedures, there would have been no basis for a charge that it was seeking to expand the unit to impose union representation on a separate, independent group of employees against their will. Cases cited by petitioner (Pet. 22), far from supporting its claim that it was required to alter the contract unit description to avoid such a charge, illustrate the illegality of employer attempts to assume authority to determine unilaterally the effects of automation on unit employees or unit job classifications. See *Metromedia, Inc., KMBC-TV* v. *NLRB*, 586 F. 2d 1182, 1187-1189 (8th Cir. 1978); *Graphic Arts International Union* v. *NLRB*, 505 F. 2d 335, 337 (D.C. Cir. 1974).

The Board's finding in the present case (Pet. App. 25a n.3) that the traditional composing room unit described in the contract "is appropriate for the purposes of collective bargaining and * * * that neither the appropriateness of the unit nor the Union's representative status is affected by the change from hot to cold type" is consistent with this analysis. That finding makes clear that petitioner has a continuing duty to bargain with the Union concerning the effects of automation on the composing room employees and may not unilaterally determine those issues. See *NLRB* v. *Columbia Tribune Publishing Co.*, 495 F. 2d 1384, 1390-1391 (8th Cir. 1974).

the scope of the unit, by the simple expedient of redefining the unit to include only those employees performing work it chose to designate to be performed in the composing room. Far from protecting employee free choice, petitioner thereby sought exclusive power to remove employees from positions in which they enjoyed union representation to positions in which they would have no bargaining representative to negotiate for them concerning the effects of petitioner's proposed changes in the way the work of the company was to be accomplished. Such an assertion of unilateral authority is in clear derogation of the Act's requirements with respect to recognition of a collective bargaining representative.

3. There is no merit to petitioner's contention (Pet. 26-29) that the Board's order imposes substantive contract terms on petitioner in derogation of the principles established in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103-109 (1970). The order merely requires petitioner to bargain with the Union, on request, in the bargaining unit as defined in the parties' most recent collective bargaining agreement (Pet. App. 28a).[7] As the court of appeals emphasized (Pet. App. 15a-16a), that provision does not foreclose petitioner from automating or transferring work out of the bargaining unit. But it does require petitioner to give timely notice and an opportunity to bargain about such changes to the unit employees' designated bargaining agent. Accordingly, the court below properly concluded that the order was a proper exercise of the Board's broad remedial authority under Section 10(c) of the Act.

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[7]Petitioner fails to recognize (Pet. 21 n.7) that it had agreed to the unit the Board here found appropriate (Pet. App. 25a n.3). Thus, the collective bargaining agreement of the parties defined the existing bargaining unit in which petitioner had for many years recognized the Union as the employees' bargaining agent (*supra*, pages 2-3). In these circumstances, the failure of the complaint to track precisely the contract unit description (Pet. 21-22 n.7) was not prejudicial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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